87-1413

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HON. TED POE,
Appellant

v.

ROBERT JACK COLLIER,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 69,739

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CATHLEEN HERASIMCHUK
Assistant District Attorney

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Counsel of Record

201 Fannin
Houston, Texas 77002
(713) 221-5826

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

37pp

QUESTIONS PRESENTED

1. Are "The State" and victims of crime, as statutorily represented by a Texas District Attorney, entitled to any protection under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Are "The State" and victims of crime entitled to invoke the same due process exception to a state legislative continuance law that similarly situated civil litigants are entitled to invoke?

LIST OF PARTIES

1. Appellant is the Hon. Ted Poe, Judge of the 228th Judicial District Court of Harris County, Texas.

2. Appellee is Robert Jack Collier, a defendant in the 228th Judicial District Court.

Other parties in interest include:

1. The Hon. John B. Holmes, Jr., District Attorney of Harris County, Texas.

2. The Hon. Debra Danburg, member of the Texas House of Representatives, one of Robert Jack Collier's attorneys.

3. Jimmie Dale Collier, wife of Robert Jack Collier, the complaining witness in Cause No. 459,914.

4. Doyelle Maines, the daughter of Jimmie Dale Collier, the complaining witness in Cause No. 459,915.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
TABLE OF AUTHORITIES	IV
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF	1
REASONS FOR FULL REVIEW	5
CONCLUSION	19
APPENDIX A—(*Noel v. State*, No. 827-83 (Tex. Crim. App., delivered March 14, 1984)	1a

TABLE OF AUTHORITIES

CASES — Page

Alta Enterprises Inc. v. Clark, 730 S.W.2d 865 (Tex. App. —Austin 1987) 8
Batson v. Kentucky, 106 S. Ct. 1712 (1986) 14
Bernstein v. Lower Moreland Township, 603 F. Supp. 907 (E.D. Pa. 1985) 13
Booth v. Maryland, 55 U.S.L.W. 4836, 4842 (June 16, 1987) 18
Collier v. Poe, No. 69,739 (Tex. Crim. App., delivered May 20, 1987) ..... *passim*
Condovest Corp. v. John Street Builders, Inc., 662 S.W.2d 138 (Tex. App.—Austin 1983, no writ) 6, 8
Curry v. Ater, 648 S.W.2d 10 (Tex. Crim. App. 1983) ... 8
Government Services Ins. Underwriters v. Jones, 368 S.W.2d 560 (Tex. 1963) 6
Hoobler v. State, 730 S.W.2d 755 (Tex. Crim. App. 1987) 15
King v. State, 160 Tex. Crim. 556, 273 S.W.2d 72 (1954) 6
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19
Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985) 10
Miranda v. Arizona, 384 U.S. 436 (1966) 12
Morris v. Slappy, 461 U.S. 1 (1983) 13
New York v. Quarles, 467 U.S. 649 (1984) 12
Noel v. State, No. 827-83 (Tex. Crim App., delivered March 14, 1984) 15
Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) 3
Snyder v. Massachusetts, 291 U.S. 97 (1934) 11
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 10, 11
State ex rel. Bryan v. McDonald, 681 S.W.2d 65 (Tex. Crim. App. 1984) 15
State ex rel. Turner v. McDonald, 676 S.W.2d 371 (Tex. Crim. App. 1984) 15
Thurmond v. Superior Court, 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985 (1967) 17
United States v. Hasting, 461 U.S. 499 (1983) 14
United States v. Salerno, 107 S. Ct. 2095 (1987) 12
Waites v. Sondock, 561 S.W.2d 772 (Tex. 1977) 8, 16, 17, 18

Page

STATUTES AND CONSTITUTIONS

Tex. Civ. Stat. Ann. art. 2168a (Repealed) 6
Tex. Civ. Prac. & Remedies Code Ann., section 30.003 (Vernon 1986) 6
Tex. Code Crim. Proc. Ann. art. 1.13 (Vernon 1977) ... 15
Tex. Code Crim. Proc. Ann. art. 2.01 (Vernon 1977) ... 2
Tex. Code Crim. Proc. Ann. art. 56.02 (Vernon Supp. 1987) 12
Tex. Code Crim. Proc. Ann. art. 56.02(c) (Vernon Supp. 1987) 2
Tex. Code Crim. Proc. Ann. art. 56.02(d) (Vernon Supp. 1987) 12
Tex. Code Crim. Proc. Ann. art. 56.03 (Vernon Supp. 1987) 12
Tex. Const. art. I, section 13 8
Tex. Const. art. I, section 19 8
Tex. Gov't Code, section 43.180(b) (Vernon 1986) 2
Tex. R. Crim. Evid. 412 12
U.S. Const. amend. XIV 3, 5, 10, 11, 16
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291 § 2(a)(1), 96 Stat. 1248 (1982) 13

OTHER AUTHORITIES

Aynes, *Constitutional Considerations: Government Responsibility and the Right Not To Be a Victim,* 11 Pepperdine L. Rev. 63 (1984) 20
Black's Law Dictionary 1262 (rev. 5th ed. 1979) 10
Note, 42 Tex. L. Rev. 391 (1964) 6

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HON. TED POE,
Appellant

v.

ROBERT JACK COLLIER,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 69,739

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

John B. Holmes, Jr., the duly elected District Attorney for Harris County, Texas, respectfully moves this court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the appel-

lant herein has been obtained, and the attorney for the appellee herein has also given his consent to the submission of a brief by John B. Holmes, Jr., as *amicus curiae*.

The *amicus curiae*, as the District Attorney of Harris County, Texas, in whose jurisdiction this case arose, is the statutory representative of the State of Texas in all criminal cases prosecuted in Harris County.[1] Tex. Code Crim. Proc. Ann. art. 2.01 (Vernon 1977); Tex. Gov't. Code, section 43.180(b) (Vernon 1986). Mr. Holmes is also the statutory representative of crime victims in Harris County and is empowered to protect their rights. Tex. Code Crim. Proc. Ann. art. 56.02(c) (Vernon Supp. 1987).

While not a named party to this mandamus action, Mr. Holmes' interests, and those of all prosecutors and crime victims throughout the State of Texas, are vitally affected by the decision rendered by the Texas Court of Criminal Appeals in *Collier v. Poe*. In this case, the Texas Court of Criminal Appeals held that "the State is not entitled to the due process of law" in a criminal proceeding. Slip op. at 25a.[2] The Texas court, in its use of the phrase "the State," was referring directly to the *amicus*

---

1. While the Office of the Attorney General for Texas wrote an *amicus curiae* brief in the Court of Criminal Appeals favoring the constitutionality of the legislative continuance statute, the Attorney General is not responsible for the rationale espoused by the Texas court. It seems inconceivable to this *amicus* that the chief law enforcement agent of a state would intend to condone, much less support, the proposition that neither he, nor any of the citizens who elected him, have any due process rights in a criminal trial.

2. All citations to the opinion rendered in *Collier v. Poe* are cross-referenced to Appendix A of the Appellant's Jurisdictional Statement.

curiae as the prosecutor of a criminal lawsuit. The decision in *Collier v. Poe* was based squarely upon a finding that neither prosecutors nor crime victims have any right to the protection of the Due Process Clause of the United States Constitution or Article I, sections 13 and 19 of the Texas Constitution. Slip op. at 27a & n. 19. While the Texas Constitution may grant greater due process protection to a litigant than does the federal constitution, *see, e.g., Sax v. Votteler,* 648 S.W.2d 661, 664 (Tex. 1983) ("we are of the opinion that the Texas Constitution, article I, section 13, does accord Texas citizens additional rights" to those guaranteed under the United States Constitution), a state constitution may not grant fewer or smaller due process rights than does the federal constitution. Thus, a blanket denial of any due process rights for "the State" necessarily rests on federal, not independent and adequate state, constitutional grounds.

While Judge Ted Poe of the 228th District Court of Harris County is the named respondent in this mandamus action, it is the *amicus curiae's* constitutional rights that were litigated. If the Texas court's ruling is allowed to stand unreviewed by this Court, and prosecutors, victims, and citizens are not considered "persons" for Fourteenth Amendment purposes, these groups will lose more than the right to assert an established due process exception to a state legislative continuance law. They will lose all claims to equal protection and substantive or procedural due process, including the right to notice and a fair hearing, in a criminal trial. Therefore, it is imperative that the *amicus curiae* be heard on the issue of whether he has any constitutional due process claim to the correct

interpretation and enforcement of criminal law in Harris County, Texas.

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Harris County District Attorney's Office
Attorney of Record

REASONS FOR FULL REVIEW

Although the decision rendered by the Texas Court of Criminal Appeals in *Collier v. Poe* might, at first blush, appear inconsequential in the over-all scheme of the American criminal justice system, this case starkly presents a fundamental issue of criminal jurisprudence that has not been directly addressed by this Court. Are there any constitutional restrictions on how the State, as the representative of its citizens, may be treated during the course of a criminal proceeding, or is Texas' highest criminal court correct when it repeatedly holds that "the State" has no due process rights or constitutional protection of the laws in criminal cases?

If *Collier v. Poe* stands unreviewed by this Court, Texas' highest criminal court would continue to be free to interpret the federal constitution in a way that leaves this state's law-abiding populace without any constitutional protection in a criminal proceeding. Courts would be free to rule by whim and caprice, disregarding state law and federal constitutional precedent, as long as these rulings redound to the benefit of the accused.

The *amicus curiae* submits that *Collier v. Poe* presents a question of first impression to this Court regarding whether the Fourteenth Amendment guarantees any due process rights to the accuser, as well as to the accused, in a criminal proceeding. This Court, as the final arbiter of the federal constitution, should exercise its appellate jurisdiction to address this issue which affects not only Texas citizens but every law-abiding citizen in the nation. If the Fourteenth Amendment does not protect "the State" in a Texas criminal proceeding, it does not protect "the State" in any jurisdiction.

A. The Decision Rendered in *Collier v. Poe* Deprives All Participants in a Criminal Proceeding, Other Than the Defendant, of Any Due Process Rights.

In *Collier v. Poe,* the Texas Court of Criminal Appeals held that a legislator-attorney has an absolute right to a legislative continuance in a criminal case during any Texas legislative session. Slip op. at 31a. If the provisions of the Legislative Continuance Statute, Tex. Civ. Prac. & Remedies Code Ann., section 30.003 (Vernon 1986) (formerly Tex. Civ. Stat. Ann. art. 2168a (Repealed)), have been met, the grant of a continuance is mandatory. Under the provision, a party's attorney in either a criminal or civil case may, by written affidavit, receive a continuance as of right for the entire period that the Texas Legislature is in regular or special session, as well as 30 days before and after those sessions. This statute applies to *any* attorney hired on a case,[3] even though, as in this case, the attorney has never appeared in court nor filed any pleading for the defendant prior to filing the affidavit for continuance (Jurisdictional Statement at 35a, Trial Court Findings of Fact, No. 15). Since Judge Poe

3. Both the Texas Supreme Court and the Texas Court of Criminal Appeals have noted that the legislative continuance law is subject to enormous abuse. *See King v. State,* 160 Tex. Crim. 556, 273 S.W.2d 72, 73 (1954) (evidence fully supported trial court's finding "that the application was a clear abuse of the privilege by one entitled to claim it under said statute"); *Government Services Ins. Underwriters v. Jones,* 368 S.W.2d 560, 565 (Tex. 1963) ("The statutory right or privilege of the legislator is undoubtedly subject to abuse"); *Condovest Corp. v. John Street Builders, Inc.,* 662 S.W.2d 138, 140-41 (Tex. App.—Austin 1983, no writ) (legislative continuance denied; legislator made no appearances, did no work on case); *see also,* Note, 42 Tex. L. Rev. 391, 397 (1964) (mandatory legislative continuance is proper only if it is not "arbitrary" and does not "operate to deny a fair opportunity to repel it").

denied Collier's motion for a legislative continuance, the Texas Court of Criminal Appeals announced that it would issue a writ of mandamus against the trial judge if he did not grant the continuance forthwith. Slip op. at 32a.

Thus, a criminal trial judge has neither the authority nor the power to consider any countervailing factors, no matter how important these interests might be. The sole eyewitness to a murder might be dying of cancer, the child abuse victim might still be living in the same house as the defendant, the robbery victim might be moving to Afghanistan, nonetheless, under *Collier v. Poe,* the trial judge may not balance these concerns against the absolute right of an attorney-legislator to a continuance.

There are many cases in which both the defense and the prosecution are well aware that the State's sole or main witness will soon be, for one reason or another, permanently unavailable. By the simple expedient of hiring on a legislator-lawyer, the defense can automatically delay any criminal trial until 30 days after the last legislative session and hope that the witness will have died, moved away, or somehow become unavailable during that time. As quoted by the Court of Criminal Appeals, Judge Poe's assessment of the statute, that it is "a self-serving law passed by the legislators for their own self-preservation," was not disputed by the very court that upheld its mandatory terms. Slip op. at 2a. In the present case, for example, Representative Danburg filed her legislative motion for continuance fourteen days before the second trial setting (Jurisdictional Statement, Finding of Fact No. 11, at 34a). Her name was never mentioned during the pre-trial hearing or the first trial setting (Jurisdictional Statement, Findings of Fact Nos. 8 & 9, at 34a). She did not even appear at the hearing

on her own motion (Jurisdictional Statement, Findings of Fact No. 13, at 34a).

In 1977, the Texas Supreme Court held that a mandatory continuance under the legislative continuance statute would "violate the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, sections 13 and 19 of the Texas Constitution." *Waites v. Sondock*, 561 S.W.2d 772, 773 (Tex. 1977). Thus, to preserve the constitutionality of the statute, the court held that a trial judge had discretion to deny a legislative continuance "when the non-moving party faces irreparable harm." *Id.* at 776. *See also, Condovest Corp. v. John Street Builders, Inc., supra,* at 140-41; *Alta Enterprises Inc. v. Clark,* 730 S.W.2d 865, 866-67 (Tex. App.—Austin 1987). While the Texas Supreme Court deals only with civil matters, the Texas Court of Criminal Appeals adopted the due process exception of *Waites v. Sondock* in *Curry v. Ater,* 648 S.W.2d 10, 12 (Tex. Crim. App. 1983).

In *Collier v. Poe,* the court jettisoned its own precedent by finding that it is irrelevant that crime victims would suffer irreparable harm[4] since they are not "the State itself," and that the State itself has no standing to assert

4. *See* Jurisdictional Statement at 35a-36a, Findings of Facts No. 18. Judge Poe found that one of the complainants, the defendant's wife, had fled the state for a period of time because of her fear of the defendant, and she had "hidden" her children in different cities. While she was testifying, she was visibly shaking, trembling, and crying. She sought medical treatment for a nervous condition caused by this offense. She believed that, if the trial were postponed, either the defendant would kill her or she would suffer a nervous breakdown. Her 16 year old daughter, the second complainant, was distraught, could not sleep at night, and was living apart from her mother because of her fear that the defendant, who was out on bond, would carry out his threats to kill her mother.

due process rights. Slip op. at 26a & n. 19. Thus, the prosecution side of a Texas criminal cause is caught in a Catch 22: victims, who are individuals, are not "the State itself"; therefore, they cannot assert any right to due process protection; "the State," since it is not an individual, cannot assert any right to due process protection. The absurd logical conclusion, then, is that no one in a criminal case has any right to due process except the defendant.

This case, however, is not about balancing a *defendant's* constitutional due process rights against those of "the State" or victims, but about mandatory statutory rights of a hired attorney. The Texas court did not mention, much less rely upon, any Sixth Amendment right to counsel on the part of the defendant. In fact, there was no mention of any of the defendant's rights, constitutional or otherwise, except that of an automatic reversal for the failure to grant a mandatory legislative continuance. Slip op. at 30a. Instead, the court stated that "the real party at interest in the instant cause is State Representative Danburg." Slip op. at 31a. Thus, the court held that an unnamed party to the lawsuit, an attorney who was not the attorney of record, had not made any appearances in the courtroom, and had not filed any pleadings for the defendant, (see Jurisdictional Statement, Findings of Fact at 35a), had not merely a cognizable, but the dominant, interest in a lawsuit. Conversely, the complainants, Jimmy Dale Collier and her daughter Doyelle Maines, who had allegedly been shot by the defendant, who were present and testified at the hearing to their trauma and continuing fear and harm, had no cognizable interest in the lawsuit since they were not "the State itself." Slip op. at 27a, n. 19. Apparently, then, defend-

ants and legislator-defense attorneys are the only two groups that have cognizable interests in a criminal trial.

Although the rights of "the State" in a criminal trial can be no greater than the rights of a single individual within that society, they can be no less either. As the Texas Court of Criminal Appeals noted in its opinion, the *amicus curiae* represents the State in all Harris County criminal cases. Slip op. at 25a. It defined "the State" as "the people of a state, in their collective capacity, considered as the party wronged by a criminal deed; the public." Slip op. at 24a (quoting Black's Law Dictionary 1262 (rev. 5th ed. 1979)). By the court's own definition, then, "the State" is not an amorphous non-being, incapable of having or asserting rights. It is, instead, a collection of individuals, each of whom have due process rights under the Fourteenth Amendment. Surely, if the giant corporations of America are "persons" entitled to the protection of the Fourteenth Amendment, *see, e.g., Metropolitan Life Ins. Co. v. Ward,* 105 S. Ct. 1676, 1683, n. 9 (1985), it cannot fairly be said that those who enforce and uphold the rights of citizens in a criminal trial deserve less. The preservation of wealth is not more deserving of constitutional protection than the preservation of life.

The Texas court cited *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), and several other federal cases for its proposition that the State itself and its agencies and political subdivisions are not entitled to the protection of the Fourteenth Amendment. Slip op. at 25a. The *amicus curiae* can only conclude that the court has misconstrued the *Katzenbach* statements. That case, as well as its progeny, stands for the proposition that a State, or any other political entity, cannot use the Fourteenth

Amendment as a sword to invalidate either federal law or its own state law. *Katzenbach, supra,* at 323-24. These cases, however, say nothing about a political entity, such as a district attorney's office, using the Fourteenth Amendment as a shield to protect itself from the incorrect interpretation or application of federal or state law. In fact, the Fourteenth Amendment *must* be available for the prosecution side of a criminal trial or else the State could never have a trial objection sustained, insist upon proper criminal procedure, or appeal a trial court's legal rulings.

Indeed, this Court has innumerable times held that society does have cognizable interests, interests that *must* be balanced against those of a defendant in a criminal trial. As early as 1934, Justice Cardozo stated that:

> The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. *But justice, though due to the accused, is due to the accuser also.* The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (emphasis added) (upholding right of trial court to take jury to view scene of crime without defendant present). As recently as the past term, this Court stated that: "We have repeatedly held that the government's regulatory interest in community safety can, in appropriate circum-

stances, outweigh an individual's liberty interest." *United States v. Salerno,* 107 S. Ct. 2095, 2102 (1987). This Court is regularly in the business of weighing the costs to society against the benefits to a defendant in finding the proper balance between their respective rights. *Compare Miranda v. Arizona,* 384 U.S. 436, 479-81 (1966) (costs to society in possibility of fewer convictions deemed acceptable when weighed against interest of enlarged protection for Fifth Amendment privilege), *with New York v. Quarles,* 467 U.S. 649, 658-59 (1984) ("need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"). If it were true that society, in whose name "the State" acts, had no substantive or procedural due process rights, then this Court would not balance those non-rights against the due process rights of a defendant.

In Texas, a crime victim does not have standing to participate as a party in a criminal proceeding. Tex. Code Crim. Proc. Ann. art. 56.02(d) (Vernon Supp. 1987). Yet, Texas law recognizes certain legal rights on the part of a victim. *See, e.g.,* Tex. Code Crim. Proc. Ann. art. 56.02 (Vernon Supp. 1987) (crime victim's rights); Tex. Code Crim. Proc. Ann. art. 56.03 (Vernon Supp. 1987) (provision for judicial consideration of victim impact statements); Tex. R. Crim. Evid. 412 (rape shield law).

Indeed, in 1982, the United States Congress recognized that:

> Without the cooperation of victims and witnesses, the criminal justice system would cease to function;

> yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.

Victim and Witness Protection Act of 1982, Pub. L. No. 97-291 § 2(a)(1), 96 Stat. 1248, 1248 (1982). One of the self-stated purposes of the Victim and Witness Protection Act was "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process." *Id.*, section (b)(1), at 1249. *See also, Bernstein v. Lower Moreland Township,* 603 F. Supp. 907, 911, n. 3 (E.D. Pa. 1985) ("The Act creates a special relationship between victims and witnesses and the federal government and establishes rights and obligations arising out of the statute having the force of law"). Thus, both federal and Texas statutory law recognize the importance of addressing the rights of crime victims in a criminal trial. So does this Court.

In *Morris v. Slappy,* 461 U.S. 1, 14 (1983), Chief Justice Burger addressed the importance of considering the interests of victims in a context precisely analogous to the present one, that of a trial court denying a defendant's motion for continuance. He stated:

> In its haste to create a novel Sixth Amendment right, the [Court of Appeals] wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less. *But*

> *in the administration of criminal justice, courts may not ignore the concerns of victims.* . . . Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; *but that factor is not to be ignored by the courts.*

Id. at 14 (emphasis added); *see also United States v. Hasting*, 461 U.S. 499, 528 (1983) (Brennan, J., & Marshall, J., concurring in part and dissenting in part) (victims' interests may be relevant in determining whether to reverse a case based on harmless error). The Court of Criminal Appeals now stands ready to issue a writ of mandamus against Judge Ted Poe for doing exactly what Chief Justice Burger told him to do.

This Court has recently held that a potential juror has a cognizable interest in a criminal trial. *See Batson v. Kentucky*, 106 S. Ct. 1712, 1718 (1986) ("[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. . . . The harm from discriminating jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."). If a potential juror has a cognizable constitutional interest in a criminal trial, there is no conceivable justification for holding that an individual crime victim, the person directly harmed by the defendant's act, is not entitled to a scintilla of constitutional protection.

If the State cannot assert due process rights in a criminal trial, as the statutory representative of either the collective society or an individual victim or witness, no one is entitled to assert any rights contrapoised to those of the criminal defendant. The logical extension of the holding in *Collier v. Poe* is that the prosecution

side of a criminal trial has no standing to complain when courts, at either the trial or appellate level, do not follow the law. Thus, a trial judge could dismiss a case merely because the defendant pled not guilty, despite the vehement opposition of the prosecutor. A judge could stop the prosecutor mid-way through a trial and declare that there is insufficient evidence to convict before the State has rested its case. If a prosecutor stood up to make a trial objection, the trial court could blithefully ignore him. If the State has no protectible substantive due process rights, it has no protectible procedural due process rights and thus is not entitled to fair notice and a hearing.

The Texas Court of Criminal Appeals has already used this rationale for holding that a felony defendant may unilaterally waive his right to a jury trial without the State's approval, even though Texas law plainly requires the prosecutor's consent. Tex. Code Crim. Proc. Ann. art. 1.13 (Vernon 1977); *see and compare State ex rel. Bryan v. McDonald,* 681 S.W.2d 65, 66 (Tex. Crim. App. 1984) *with State ex rel. Turner v. McDonald,* 676 S.W.2d 371, 373-74 (Tex. Crim. App. 1984). That same defendant who waived a jury trial and entered a plea to the court over the State's opposition, may later invalidate his conviction on the basis that the jury waiver was not signed by the State. *Hoobler v. State,* 730 S.W. 2d 755, 756 (Tex. Crim. App. 1987). The State, however, cannot prevent the court from accepting that improper plea. *Bryan v. McDonald, supra,* at 66.

In another, as yet unpublished, opinion, *Noel v. State,* No. 827-83 (Tex. Crim. App., delivered March 14, 1984) (See Appendix A), the court held that the State is not entitled to raise fundamental unassigned error at the appellate level although the defendant is so entitled

because "we find no analogous constitutional guaranty *to*, or protection *of*, the State, to those contained in the Due Process Clauses of our State and Federal constitutions protecting citizens." *Id.*, Amicus Appendix A at 7a (emphasis in original).[5] The *amicus* submits that his concerns regarding the State's right to complain of any substantive or procedural error is in jeopardy. Trial and appellate judges are free to misinterpret, misapply, and generally mangle federal or state law with impunity if the State has no substantive or procedural due process.

Indeed, the *amicus curiae* suggests that the Texas Court of Criminal Appeals was simply mistaken when it asserted, in *Collier v. Poe*, that neither "the State" nor victims of crime, as represented by the prosecutor, have any right to the protection of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

B. Victims of Crime and "the State" Are Deprived of the Right to Invoke the Same Due Process Exception to a State Legislative Continuance Law that Similarly Situated Civil Litigants Are Entitled to Invoke.

By rejecting the *Waites v. Sondock* due process "irreparable harm" exception to the legislative continuance law, the Texas Court of Criminal Appeals has discriminated against a particular class of citizens, crime victims,

---

5. Four judges "vigorously" dissented to "the majority's denial of the State to have equal access to the Court." *Id.* Amicus Appendix A at 10a (McCormick, J., joined by Onion, P. J., Davis, & Campbell, J.J., dissenting). Presiding Judge Onion wrote the opinion in *Collier v. Poe*, and not a single judge dissented from the present holding which would effectively deny the State *any* due process right of access to the court. *Tempora mutantur, nos et mutamur in illis.*

without any rational basis. The legislative continuance law applies equally to civil and criminal cases. Logically, then, a constitutionally required due process exception to its mandatory terms would apply equally to civil and criminal litigants unless there were some rational basis to treat these similarly situated groups differently.

Civil and criminal litigants have equal rights to constitutional protection. Crime victims are citizens. They, like all citizens, are entitled to equal protection under the Fourteenth Amendment. By becoming a crime victim, they are not simultaneously robbed of their membership in that class of citizens entitled to equal protection of the laws. The Texas court dismissed any constitutional standing by Jimmie Collier and her daughter because they were not the named litigants, not "the State itself." Slip op. at 23a, n. 19. *Waites v. Sondock,* however, never made any distinction between named and unnamed litigants. Instead, it carved out an exception to what would otherwise be an unconstitutional law by holding that a legislative continuance is not mandatory "in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay." *Id.* at 776. This "substantial existing right" need not be a right of the named litigant; it refers to a substantial right by *any* person. Indeed, in *Waites v. Sondock,* the aggrieved party was the child, not the mother who was bringing the action. "The mother here claims that the support payments are critical to her ability to feed and support her children." *Id.* at 774. Late payments "will not compensate *the child* for any injury resulting from the mother's present inability to care for the child." *Id.* at 775. *See also, Thurmond v. Superior Court,* 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985 (1967) (cited

in *Waites;* there it was the guardian who was the named litigant asserting the rights of the mother and her unborn child in a pending paternity suit). Thus, there was no basis for the court in *Collier v. Poe* to dismiss the victims' harm as irrelevant merely because they were not "the State itself," though they were, of course, named parties as the alleged complainants.

Crime victims and citizens do have legitimate interests in a criminal trial and these interests must be balanced against the rights of a defendant, even though, in some instances, they may be found less weighty. Just this past term, four members of this Court were willing to uphold admission of a victim impact statement in the sentencing phase of a capital murder case. *Booth v. Maryland,* 55 U.S.L.W. 4836, 4842 (June 16, 1987) (Scalia, J., joined by Rehnquist, C.J., White and O'Connor, J.J., dissenting). Justice Scalia expressed well the concerns felt throughout this nation regarding the present plight of crime victims within the American criminal justice system.

> Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights"—a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses come forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced--which (and *not* moral guilt alone) is one

> of the reasons society deems his act worthy of the prescribed penalty.

Id. at 4842. Even when the victims' interests are found to be an insufficient counterweight to the special constitutional protections afforded criminal defendants, nothing in the constitution prevents consideration of those interests. It is unlikely that our criminal justice system will long endure if trial judges are *required* to ignore the harm done to victims when exercising their judicial discretion, and appellate judges declare crime victims "nonpersons" for constitutional purposes in a criminal trial.

To permit the Texas court's holding that a crime victim, as opposed to a civil suit victim, has no rights that even bear consideration on the issue of "irreparable harm" such as to deny a legislative continuance, not only denies that victim *equal* protection of the law, it denies him *any* protection. But as long ago as 1803, in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803), this Court held that "[t]he very essence of civil liberty certainly consists of the right of *every individual* to claim the protection of the laws, *whenever he receives any injury.* One of the first duties of government is to afford that protection . . ." *Id.* at 163 (emphasis added). The *amicus* respectfully requests this Court to redress the wrong that has been done not only to Jimmie Collier and her daughter, but to all present and potential crime victims in the State of Texas in denying them any protection of the law.

CONCLUSION

In *Collier v. Poe,* the Texas Court of Criminal Appeals stated that neither "the State," as the representative of its citizens, nor crime victims are entitled to invoke the pro-

tection of the Due Process Clause of the Fourteenth Amendment. The *amicus curiae* submits that this decision turns the criminal justice system upside-down. The State was originally made a partner in the criminal justice system to protect innocent citizens from criminals and to vindicate the victim's rights. *See* Aynes, *Constitutional Considerations: Government Responsibility and the Right Not To Be a Victim,* 11 Pepperdine L. Rev. 63, 72 (1984). Have we come so far from our beginnings that we are prepared to state that *only* defendants have due process rights in a criminal proceeding? That is the question directly presented by *Collier v. Poe,* and it is one that only this Court, as the final expositor of the United States Constitution can answer.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CATHLEEN HERASIMCHUK
Assistant District Attorney

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Counsel of Record

201 Fannin
Houston, Texas 77002
(713) 221-5826

APPENDIX A

NO. 827-83

MICHAEL STEVEN NOEL,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fifth Supreme Judicial District of Texas [DALLAS County]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Before us on appellant's petition for discretionary review is a conviction for involuntary manslaughter, affirmed by the Dallas Court of Appeals in an unpublished opinion.

Appellant's sole ground of error on direct appeal contended the trial court erred in overruling his motion to discharge filed pursuant to Chapter 32A, V.A.C.C.P., the Speedy Trial Act (the Act), because the State was not ready to try him within 120 days of the commencement of the prosecution against him.

The court of appeals found 155 days elapsed between the day appellant was indicted and the day the State first announced ready;[1] that court, however, declined to reach the merits of the contention for the stated reason that

1. On remand, the court of appeals should carefully reassess the record in this regard.

appellant failed to "present his motion to dismiss before the day of trial," citing Art. 32A.02, § 3, V.A.C.C.P. and several decisions from other courts of appeals.[2]

We granted appellant's petition for discretionary review to determine whether Article 32A.02, § 3, supra, (or any other provision) requires an accused to file his Chapter 32A motion to dismiss "before the day of trial," or waive his rights under the Act.

Our review of the decisions relied on by the court of appeals reveals the cited rule is traceable only to *obiter dictum* written in Finch v. State, 629 S.W.2d 876 (Tex. App.—Fort Worth 1982), which was reversed by this Court for the reason, *inter alia,* that "the motion was in fact timely filed and urged under Article 32A.02, § 3, supra."[3] In addition to being unnecessary to the Fort Worth Court of Appeals' decision, the purported rule was simply announced without cited authority or supporting reasoning in *Finch,* supra.

Accordingly, since we have neither the reasoning nor analysis impelling the court of appeals' decision in this case, we turn to the wording of the statute in issue.

Article 32A.02, § 3, supra, provides:

> "The failure of a defendant to move for discharge under the provisions of this article *prior to trial* or

---

2. As cited by the court below:
"Maddox v. State, 635 S.W.2d 456, 458 (Tex. App.—San Antonio 1981, no p.d.r.); Kennedy v. State, 630 S.W.2d 509, 510 (Tex. App.—Fort Worth 1981, no p.d.r.); Finch v. State, 629 S.W.2d 877, 878 (Tex. App.—Fort Worth 1982, rev'd on other grounds, 643 S.W.2d 414 (Tex. Crim. App. 1982); De La Rosa v. State, 627 S.W.2d 207, 211 (Tex. App.—San Antonio 1981, no p.d.r.)."

3. Finch v. State, 643 S.W.2d 414, 415 (Tex. Cr. App. 1982).

> the entry of a plea of guilty constitutes a waiver of the rights accorded by this article."[4]

As a matter of statutory construction, it is initially apparent that the statute is not ambiguous on its face. It does not state the pertinent motion must be made "two weeks prior to trial;" nor does it require its filing "one day prior to trial." Since the statute is unambiguous, no question of statutory construction arises.

Finally, as a matter of public policy, it is clear that questions directed to the very power of the court to resolve criminal controversies[5] must be raised before trial proceedings actually begin; at risk is judicial economy in general and the trial judge's control of his court in particular.

Responsive to these policies, the Legislature has placed the duty on one seeking to defeat the court's jurisdiction to try him, to launch his attack before that authority is exercised. And in similar contexts (but without legislative guidance) such motions have been variably deemed timely when urged prior to announcement of ready[6] or so long as testimony has not yet begun.[7] That the above

---

4. All emphasis is supplied by the writer of this opinion unless otherwise indicated.

5. This would include an attack on the State's pleadings or any other complaint which, if sustained, would necessitate a delay of trial, as well as pure questions of jurisdiction.

6. Compare, e.g., Graham v. State, 502 S.W.2d 809 (Tex. Cr. App. 1973); and Burkett v. State, 485 S.W.2d 578 (Tex. Cr. App. 19) with Tone v. State, 505 S.W.2d 300 (Tex. Cr. App. 1974) (Opinion on Appellant's Motion for Rehearing); and Dempsey v. State, 496 S.W.2d 49 (Tex. Cr. App. 1973).

7. E.g., Garner v. State, 545 S.W.2d 178 (Tex. Cr. App. 1977).

policies are fully effectuated thereby is implicit in these holdings.

Thus, when the record reflects these policies have in no way been frustrated and the trial court has considered and ruled on the merits of the motion, we discern no licit interest of reviewing courts in holding the motion untimely; see, e.g., Matte v. State, 572 S.W.2d 547 (Tex. Cr. App. 1978); this is particularly so when, as here, such a holding is contrary to the clear language of the governing procedural statute.

We hold the court of appeals erred by refusing to consider the correctness of the trial court's ruling on appellant's Chapter 32A motion to dismiss[8] on the ground that appellant failed to move for dismissal at some time before the day of trial, and the cases relied on by the court of appeals are therefore overruled.

This cause must accordingly be remanded to the court of appeals for consideration of appellant's ground of error.

The State, in opposing this petition for review, has made two arguments before this Court which will be addressed in the interest of judicial economy.

First, by both brief and oral argument, the State has vehemently assailed the sufficiency of appellant's Chapter 32A motion. Contending the motion makes only "the conclusory allegation" that "the State was not ready within the act's time limits,"[9] the State claims an ac-

---

8. Appellant's ground of error in the court below alleged: "The trial court erred in failing to dismiss the indictment for want of speedy trial within 120 days."

9. The record reveals appellant's motion actually alleged in pertinent part that "the State was not ready *within 120 days* as required by Art. 32.02A of the Code of Criminal Procedure."

cused's motion to dismiss should "set forth facts which, if true, would entitle [him] to relief under the provisions of the act." The State has not elaborated on exactly *what* facts would entitle an accused to relief other than those alleged in the instant case.[10]

We agree with the State to the extent it would be the better practice for the moving defendant to aver the date the criminal action commenced by virtue of the applicable event (indictment, information, complaint, or arrest) in his Chapter 32A motion to discharge. By the same token, it would be preferable for the prosecution to aver in the written announcements of ready which are apparently routinely filed throughout the State, what preparation has been made in support of the conclusion that the State is in fact ready for trial. Factual elaboration by both parties in these respects would be of great assistance to the trial court in circumscribing and resolving the issues raised and for this reason, it is encouraged.

But the fact remains that if an accused can prove in an adversarial proceeding exactly what was alleged here, he *is* entitled to relief;[11] and if he cannot disprove what the State has alleged in its written announcement of ready, he is not entitled to relief. The burdens presently placed

---

10. We presume the State does not suggest defendants should negate by pleading all the statutory exclusions contained in Article 32A.02, § 4, since before a material issue arises as to the State's entitlement to a statutory exclusion of time, the trial court must find, or the State must necessarily concede that it was not ready within the initial 120 day period while asserting and demonstrating that its posture in this regard has been due to something other than prosecutorial neglect. In other words, the "exclusions" are in the nature of "confession and avoidance" and inure solely to the benefit of the State.

11. But see n. 10, *ante*.

on the accused seem adequate to protect whatever interest the State might have in the wording of the former's motion to discharge.

We accordingly hold a motion to dismiss or discharge filed pursuant to Chapter 32A, is sufficient to entitle the accused to an opportunity to present evidence on issues raised thereby if, when reasonably construed, it informs the trial judge of the basis of his complaint. See Zillender v. State, 557 S.W.2d 515 (Tex. Cr. App. 1977).

Finally, in oral argument before this Court, the State contended the caption to the legislation creating the Speedy Trial Act is defective and the Act therefore unconstitutional under Ex parte Crisp, et al., 661 S.W.2d 944 (Tex. Cr. App. 1983). Unlike *Crisp,* however, the State neither raised this argument in the trial court, nor in the court of appeals. And since no petition for discretionary review was filed in this court on behalf of the State, counsel for the State was asked by what procedural vehicle the issue might be considered before the court. Conceding no statutory authority exists for it, counsel for the State urged our consideration of the issue as an "unassigned error" on the rationale expressed in Carter v. State, 656 S.W.2d 468 (Tex. Cr. App. 1983).

In *Carter,* supra, we rejected the State's claim that no statutory or *constitutional* authority existed for a court of appeals' consideration of fundamental unassigned error upon the appeal of a judgment of conviction. A careful reading of *Carter* makes it clear an appellate court's authority to review matters of a "fundamental" nature flows from the constitutional assurance of the course of law due those whose life or liberty is sought to be affected by the State. Also called "fundamental fairness," these

processes are guaranteed citizens *by* the State.[12] (Or, in the context of the Federal Constitution, States are *prohibited from depriving* "any person of life, liberty, or property without due process of law." Amendment XIV, Section 1.)

In sum, we find no analogous constitutional guaranty *to,* or protection *of,* the State, to those contained in the Due Process Clauses of our State and Federal constitutions protecting citizens. Thus, the rationale of *Carter,* supra, is inapposite.

We hold the State's failure to pursue the orderly procedure for discretionary review in raising the constitutional claim now urged, presents nothing for review in this court on the merits.

The judgment of the court of appeals is reversed; this cause is remanded to the court of appeals for consideration of appellant's speedy trial claim.

It is so ordered.

CLINTON, Judge

(Delivered March 14, 1984)

---

12. *"No citizen* of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. Art. 1, § 19.

CONCURRING OPINION

The dissenting opinion fails to grasp the holding of Ex Parte Crisp, 661 S.W.2d 944 (Tex. Cr. App. 1983) (motion for rehearing denied with written opinion, 661 S.W.2d 956). The caption dealt with in *Crisp*, supra, reads as follows:

> "An act relating to offenses and criminal penalties under the Texas Controlled Substances Act." *Crisp*, supra at 949.

The caption of the Speedy Trial Act reads as follows:

> "AN ACT relating to a speedy trial of criminal cases; amending the Code of Criminal Procedure, 1965, as amended by adding Chapter 32A, by adding Articles 17.151 and 28.061, and by amending Articles 29.02 and 29.03; providing for an effective date; and declaring an emergency. Acts 1977, 65th Legislature, ch. 787, p. 1970."

Although the two above-mentioned captions both use the words "relating to," the State is in error if it assumes that our holding in *Crisp* means that all captions containing the words "relating to" will be held defective. As stated by Judge Clinton in his concurring (majority on rehearing) opinion in *Crisp*:

> "The instant caption says only that the bill is an act *relating* to something else. It does not even tell the reader that the act is to *amend* any part of the Texas Controlled Substances Act. As stated it gives no hint of what is its 'general purpose'—its proposed content." (emphasis in original) *Crisp*, supra at 950.

As further stated by Judge Odom on rehearing in *Crisp*, supra,

> "[Judge Clinton's] opinion expressed the view that the caption was utterly insufficient to express even a single subject. . . ."
>
> * * *
>
> "We hold the caption is utterly defective for the reason stated in [Judge Clinton's] opinion on original submission, and overrule the state's motion for rehearing. It requires little imagination to see how the requirement of Art. III, Sec. 35, supra, would be rendered totally useless if the caption in this case were sufficient. In the future it would be sufficient to use one of the few standard form captions, such as 'An act relating to the Penal Code,' 'An Act relating to the Code of Criminal Procedure,' 'An Act relating to the Family code,' etc." *Crisp*, supra at 957 (on rehearing).

A "speedy trial" *is* a specific subject whereas the Texas Controlled Substances Act is much more than a subject. Moreover, the caption in the Speedy Trial Act does inform the reader that the Code of Criminal Procedure will be amended and that new sections will be added. In no way can our holding in *Crisp*, supra, be authority for declaring the Speedy Trial Act caption violative of Art. III, Sec. 35 of the Texas Constitution.

Accordingly, I concur in the judgment of the Court in remanding the case to the Court of Appeals for consideration of appellant's speedy trial claim.

Miller, Judge

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Today the majority sidesteps a most urgent and important issue by chastising the State for failing to urge its *response* to appellant's arguments through the "orderly procedure for discretionary review." Since when does a response urged by one of the parties before this Court present nothing for review?

Appellant sought discretionary review and relief from his conviction based on an alleged violation of the Speedy Trial Act. The State responded: first, that the record did not support appellant's contention and in the alternative that, if support were in the record for relief, such relief should be denied because the statute under which appellant would be entitled to relief is unconstitutional.

It has long been the rule that an issue of constitutional dimension may be raised at any time. What is of more constitutional dimension than that of the constitutionality of a statute under which numerous convictions have been set aside?

A careful comparison of the holding in Ex parte Crisp, 661 S.W.2d 944 (Tex. Cr. App. 1983), with the caption of the Speedy Trial Act makes it readily apparent that the State's position not only has merit, (assuming *Crisp* is correct), but that the Speedy Trial Act suffers from the exact malady diagnosed in *Crisp*.[1]

To the majority's denial of the State to have equal access to the Court, I vigorously dissent.

McCORMICK, Judge

Onion, P.J., Davis, and Campbell, J.J., join in this dissent.

---

1. Surprisingly, the concurring opinion, in addressing the merits of the State's argument, does what the majority says cannot be done. A reading of the concurring opinion shows the author has completely misread the argument of the State in the instant case and still fails to comprehend Article 3, Section 35 of the Texas Constitution.